COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12141

Hearing Date: August 20, 2024
Decision Issued: September 17, 2024

PROCEDURAL HISTORY

On March 15, 2024, Grievant was issued a Group II Written Notice of disciplinary action for violation of DHRM Policy 2.35, Civility in the Workplace.

On April 12, 2024, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and the matter advanced to hearing. On June 10, 2024, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On August 20, 2024, a hearing was held at Agency offices in the metropolitan area of Richmond, Virginia.

APPEARANCES

Grievant
Agency Advocate
Agency Party Designee
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Group II Written Notice of disciplinary action?

2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g. properly characterized as a Group I, II or III offense)?

4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Grievant is a licensing inspector for the Agency. Grievant has been employed by the Agency as a licensing inspector for more than 23 years. Grievant is supervised by Supervisor. Supervisor reports to Associate Director. Evidence was introduced during the hearing to show that Grievant has an active Group I Written Notice of disciplinary action for failure to follow procedures relating to applications for licensure.

Witness 1 began working for the Agency on November 27, 2023.[1] Witness 1 also is a licensing inspector for the Agency. Grievant and Witness 1 are both licensing inspectors, but they report to different supervisors. Witness 1 is supervised by Licensing Administrator. Based on the evidence presented during the hearing, it does not appear that Grievant has ever been supervised by Licensing Administrator.

In February 2024, Witness 1 had been employed by the Agency for approximately 2.5 to 3 months and had limited interactions with Grievant. Following a meeting on February 13, 2024, Grievant called Witness 1 regarding a work-related matter.[2]

During the telephone conversation on February 13, 2024, Grievant and Witness 1 discussed cases. Grievant and Witness 1 also discussed situations when a licensing inspector may identify what they believe is a violation at a facility, but the violation ultimately may be removed from the inspection after review and discussion with a supervisor. During the conversation, Grievant told Witness 1 to "watch your back" and to be careful of Licensing Administrator.[3] Grievant also discussed a former employee with

[1] Hearing Recording at 1:27:38-1:29:00.
[2] Hearing Recording at 40:00-41:18.
[3] Hearing Recording at 40:00-43:00, 52:20-55:00, 1:12:00-1:13:08, and Agency Ex. at 35. And see, Gr. Ex. at 11.

Witness 1. In the context of the former employee's relationship with Licensing Administrator, Grievant told Witness 1 that, "I'm from Mississippi. And when white folks talk bad about other white folks, you know that it's bad."[4] Before the conversation ended, Grievant made Witness 1 aware of available job postings and offered to forward the postings to Witness 1.[5]

Witness 1 was uncomfortable with the conversation with Grievant, so she later "confided" in Witness 2, another licensing inspector about the conversation. Witness 1 testified that she was comfortable speaking with Witness 2 because she was more experienced, knew Grievant better than Witness 1 did, and she wanted to seek her guidance about the information Grievant had shared.

Witness 2 reported to Licensing Administrator the content of the conversation that Witness 1 had described. When Witness 2 relayed her understanding of the conversation Witness 1 had described, she falsely indicated that Witness 1 had not revealed to her the name of the other participant in the conversation.

CONCLUSIONS OF POLICY

Section 2.2-3000 of the Code of Virginia provides that state employees "shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes that may arise between state agencies and those employees who have access to the procedure."[6] An employee's right to discuss their concerns with management, must be balanced against the Agency's need to efficiently conduct its operations and business.[7]

Therefore, although state employees have the right to discuss freely, and without retaliation, their concerns with their immediate supervisor and management, the Standards of Conduct also set forth the expectation that state employees demonstrate respect for their Agency and toward other employees. Consistent with Virginia Code § 2.2-3000, the Standards of Conduct also set forth the expectation for state employees to resolve work-related issues and disputes in a professional manner and through established processes.[8] DHRM Policy 2.35, Civility in the Workplace, makes clear that "[b]ehaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable."[9] Demonstrating behavior that is rude, inappropriate, discourteous, unprofessional, unethical, or dishonest is prohibited.

---

[4] Agency Ex. at 35 and see Hearing Recording at 43:00-43:53, 1:02:20-1:02:54 and Gr. Ex. at 12.
[5] Hearing Recording at 46:00-46:41, 55:00-56:30 and Agency Ex. at 35 and see Gr. Ex. at 12.
[6] Va. Code § 2.2-3000.
[7] *See* Va. Code 2.2-3004(B).
[8] *See* DHRM Policy 1.60, Standards of Conduct.
[9] *See* DHRM Policy 2.35, Civility in the Workplace, General Provisions.

Whether Grievant engaged in the behavior and whether the behavior constituted misconduct

During the telephone conversation on February 13, 2024, Grievant told Witness 1 to "watch your back" and to be careful of Licensing Administrator.[10] In the context of discussing the relationship between Licensing Administrator and a former employee, Grievant told Witness 1 that "I'm from Mississippi. And when white folks talk bad about other white folks, you know that it's bad."[11] Although Grievant did not testify during the hearing, information she provided, including a written response to the Agency, indicate that Grievant admitted that she told Witness 1 to "watch your back" and "I'm from Mississippi. And when white folks talk bad about other white folks, you know that it's bad."[12]

Grievant argued that she did not tell Witness 1 to be careful of Licensing Administrator. Grievant argued that when she told Witness 1 to "watch your back" she meant that Witness 1 "should continue to thoroughly document the facility's non-compliance if warranted, as that is our job."[13] Witness 1, however, testified that Grievant told her to "watch your back" and to be careful of Licensing Administrator.[14] This Hearing Officer found Witness 1's testimony to be credible and consistent with the written statement Witness 1 provided to the Agency on February 15, 2024.[15] Witness 1's testimony and understanding of what Grievant was saying to her also is consistent with the general usage of the idiom "watch your back" which is generally to warn someone to be careful of the people and environment around them in order to avoid harm. Witness 1's understanding that Grievant was warning her to be careful of Licensing Administrator also is consistent with Grievant's admission that she told Witness 1 that, "I'm from Mississippi. And when white folks talk bad about other white folks, you know it's bad."[16] Witness 1's written statement to the Agency on February 15, 2024, indicated that Grievant made the statement in the context of a former employee making comments about Licensing Administrator.[17]

With respect to Grievant's statement about "when white folks talk bad about other white folks," Grievant has not provided an explanation as to her use of the phrase, but wrote in a response to the Agency that Grievant "liken[ed] this statement to the image that is being presented in mandated training about women of color within this agency; of black females having poor impulse control."[18] Grievant appeared to argue during the hearing her perception that the Agency has perpetuated a negative stereotype of black women as having poor impulse control, including through mandated training. Grievant did not provide a copy of the training, but Associate Director and Supervisor both testified

[10] Hearing Recording at 40:00-43:00, 52:20-55:00, 1:12:00-1:13:08, and Agency Ex. at 35. And see, Gr. Ex. at 11.
[11] Agency Ex. at 35.
[12] Gr. Ex. at 12.
[13] Gr. Ex. at 11.
[14] Hearing Recording at 40:00-43:00, 52:20-55:00, 1:12:00-1:13:08, and Agency Ex. at 35.
[15] Hearing Recording at 40:00-43:00, 52:20-55:00, 1:12:00-1:13:08, and Agency Ex. at 35. And see, Gr. Ex. at 11.
[16] Gr. Ex. at 12.
[17] Agency Ex. at 35.
[18] Agency Ex. at 28.

that they reviewed the training and did not share Grievant's perception. It is not clear whether Grievant is linking her use of the phrase about "white folks talking bad about other white folks" with her perception of the image in the Agency's training to suggest that the Agency has condoned race-based stereotypes or to suggest that race-based stereotyping may be perceived where it is unintended. If Grievant's argument is that the Agency has condoned race-based stereotypes, she has provided no evidence of such or why it relieves her of misconduct in this case. Whether Grievant's statement about "when white folks talk bad about other white folks" was intended by Grievant to perpetuate some stereotype or not, the statement was not appropriate in the workplace particularly in the context of furthering a negative impression of Licensing Administrator to Witness 1.

This Hearing Officer did not find relevant, and did not consider, the testimony that the Agency offered from Witness 2 as to alleged past behavior by Grievant. Witness 2's testimony arguably provided some context for her concern when Witness 1 described the conversation Witness 1 had with Grievant. This Hearing Officer, however, did not find the past behavior described by Witness 2 relevant to this proceeding because the behavior described by Witness 2 was not part of the alleged misconduct at issue in this case; the behavior Witness 2 attributed to Grievant was described as occurring several years ago; and, although Witness 2 testified that she had reported Grievant's alleged behavior to a supervisor, there was no evidence that the Agency had addressed such behavior with Grievant when the Agency was, or should reasonably have been, aware of it.

Grievant's comments to Witness 1, a new employee with whom she had limited prior interactions to, "watch your back" and be careful of Licensing Administrator and that "I'm from Mississippi. And when white folks talk bad about other white folks, you know it's bad" were inappropriate, discourteous, unprofessional and disparaging of Licensing Administrator. Such comments violate DHRM Policy 2.35, Civility in the Workplace, and by their nature, undermine team cohesion, staff morale, and productivity and are not acceptable in the workplace.

Grievant appeared to argue that Witness 1 could have told her that her comments and the conversation made Witness 1 uncomfortable, and Witness 1 never did so. Whether Grievant would have been receptive to Witness 1 addressing her concerns with Grievant's behavior directly with Grievant, does not change the fact that Grievant engaged in the misconduct for which she is charged.

The Agency has met its burden of proving that Grievant engaged in misconduct.

Whether the Agency's discipline was consistent with law and policy

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include

acts of misconduct of such a severe nature that a first occurrence normally should warrant termination." [19]

In this case, the Agency determined that Grievant's misconduct was a Group II offense. Examples of Group II offenses include: failure to follow supervisor's instructions; failure to comply with written policy or agency procedures; violation of safety/health rule(s) where no threat to bodily harm exists; leaving work without permission; failure to report to work without proper notice/approval; unauthorized use or misuse of state property; refusal to work overtime, etc.

DHRM Policy 2.35, Civility in the Workplace, and its associated guidance permit agencies to assess the severity of an offense and its effect on the workplace in selecting the appropriate level of discipline. These determinations are fact-specific and subject to substantial discretion by agency management. In this case, Associate Director, Supervisor, and Licensing Administrator consistently testified regarding the challenges the Agency has with filling licensing inspector positions and the potential impact comments like Grievant's may have on new employees. These witnesses also expressed specific concerns about the impact on retention of Witness 1 who was still a new employee at the time this matter arose.[20] Indeed, Witness 1 testified that she was uncomfortable with the conversation and expressed her discomfort in the context of having left a prior position that Witness 1 considered to be toxic or "messy."[21] Grievant's comments to Witness 1 advising her to "watch your back" and be careful of Witness 1's supervisor, Licensing Administrator, reasonably made Witness 1 uncomfortable because the nature of such comments is to lower morale and undermine trust and team cohesion. Although Witness 1 testified that initially she considered Grievant's comments to be "office gossip" which "rolled off [her] back to a certain degree," Witness 1 also described being uncomfortable by the comments, especially given a past "messy" work experience that she had left to come to the Agency.[22] Witness 1's discomfort with the conversation with Grievant was of a sufficient degree that she confided in a colleague to seek guidance. The Agency's concern about the impact of such comments on Witness 1 and on the Agency's ability to retain employees, like Witness 1, was reasonable.

The Agency's discipline was consistent with law and policy.

Grievant argued that the Agency inappropriately considered, as an aggravating factor, complaints from Agency customers about Grievant's communication style and customer service. Indeed, Supervisor testified that she considered a customer complaint that gave rise to the active Group I Written Notice issued to Grievant on November 15, 2023 (and revised on February 9, 2024), as well as other complaints from customers. To the extent the Agency considered customer service complaints for which Grievant had not been disciplined and for which she was not provided notice were a factor in this disciplinary action, such consideration was inappropriate. Although the Agency may have considered that the Grievant had an active Group I Written Notice as a reason to not

[19] The Department of Human Resources Management ("DHRM") has issued Standards of Conduct for State employees, DHRM Policy 1.60, Standards of Conduct.
[20] Hearing Recording at 19:04-21:36, 1:40:00-1:41:54, 2:23:00-2:24:57.
[21] Hearing Recording at 44:45-46:00, 1:08:46-1:10:49 and see Agency Ex. at 35.
[22] Hearing Recording at 1:08:44-1:10:00, 1:12:00-1:13:55.

mitigate discipline in this case, the customer service complaint that gave rise to the Group I Written Notice appeared to primarily relate to the timely processing of an application and did not appear to be sufficiently similar to the misconduct alleged in this case to serve as a factor to raise the level of the offense. Even in the absence of such aggravating factors, however, the Agency's decision to issue a Group II Written Notice for violation of DHRM Policy 2.35 is reasonable.

Due Process

Grievant argued that Supervisor and Associate Director accepted as true Witness 1's version of events and made up their minds before speaking with Grievant. Grievant argued that Supervisor and Associate Director never specifically asked Grievant for her version of the conversation with Witness 1. Grievant essentially argued that the Agency did not afford her with sufficient due process. The hearing process cures any such deficiency. Grievant had the opportunity to cross-examine Agency witnesses and to present any evidence and arguments she wished during the hearing.

Mitigation

Grievant appeared to argue that she was being treated differently from Witness 1 who, Grievant argued was a similarly situated, active participant in the conversation on February 13, 2024. As an example, Grievant argued that Witness 1 described one of a former employee's files as "a mess." This Hearing Officer is not persuaded by Grievant's argument. An alleged comment by Witness 1, a new employee, regarding her observation of a file as "a mess" is not comparable to comments by Grievant, an employee with more than 23 years of experience, warning Witness 1 to "watch your back" and to be careful of Witness 1's supervisor.

Virginia Code § 2.2-3005.1 authorizes hearing officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management…."[23] Under the Rules for Conducting Grievance Hearings, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

[23] Va. Code § 2.2-3005.

DECISION

For the reasons stated herein, the Agency's issuance to Grievant of the Group II Written Notice of disciplinary action is **upheld**.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar-day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[24]

Angela Jenkins

_____

Angela L. Jenkins, Esq.
Hearing Officer

[24] See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant.